Filed 8/31/16 Asad v. Chevron Stations CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MUHAMMAD ASAD et al., Plaintiffs and Appellants, v. CHEVRON STATIONS, INC., Defendant and Respondent.	B259333 c/w B263470 (Los Angeles County Super. Ct. No. BC470198)

APPEAL from orders of the Superior Court of Los Angeles County. Elihu M. Berle, Judge. Affirmed.

Diversity Law Group and Larry W. Lee; Law Offices of Sherry Jung and Sherry Jung; Hyun Legal and Dennis S. Hyun for Plaintiffs and Appellants.

Sedgwick, Robert D. Eassa and Delia A. Isvoranu for Defendant and Respondent.

Plaintiffs and appellants Muhammad Asad and Diana Lei (collectively, plaintiffs) appeal from the trial court's orders denying their motion for class certification in this action against defendant and respondent Chevron Stations, Inc. (defendant) for unpaid wages, violation of Labor Code sections 2802, 226, and 2698, and violation of Business and Professions Code section 17200. We affirm the orders denying class certification.

BACKGROUND

The parties

Defendant owns and operates Chevron gasoline stations throughout the state of California. Asad was employed by defendant in its retail gasoline stations as a nonexempt employee[1] until October 14, 2010, and Lei was employed by defendant as a nonexempt employee until July 31, 2008. Both plaintiffs worked as station managers at some time during their employment.

Defendant's employee timekeeping system

Employees working onsite at defendant's gas stations clock in and out through an electronic timekeeping system known as Blue Cube. Defendant began installing Blue Cube at its California stations in the fall of 2008. Until Blue Cube was installed, station employees manually recorded their work hours on paper timesheets.

When employees work offsite, they are unable to use Blue Cube and must report their hours worked, including any job-related travel time, to their station manager or assistant manager. Station managers and assistant managers are responsible for recording offsite work hours and work-related travel time for employees. The manager does so by manually entering the time into Blue Cube through an electronic function known as the "adjustment editor."

---

[1] California law distinguishes between nonexempt and exempt employees for purposes of requiring overtime pay and providing meal and rest break periods. (See, e.g., Lab. Code, §§ 226.7, 510, 515, subd. (a).) Nonexempt employees are covered by wage and hour and meal and rest break requirements, whereas exempt employees are not. Exempt employees are "persons employed in administrative, executive, or professional capacities." (Cal. Code Regs., tit. 8, § 11070, subd. 1(A).)

The adjustment editor function contains a drop down menu with a series of possible reasons for the adjustment in employee work hours. When adding time to an employee's electronic timecard, the manager provides a reason for the adjustment by selecting from a list of available coding options in the drop down menu. Travel, or the "TVL" code, is one of the options. In addition to selecting a coding option from the drop down menu, a manager can, but is not required to, include comments or a brief explanation of the reason for the time adjustment.

Time entered into Blue Cube is counted as hours worked. Blue Cube automatically calculates all recorded hours and transmits them to defendant's payroll department for payment.

Defendant's work-related travel policy

At all times relevant to this action, defendant had a written policy to compensate its nonexempt employees for work-related travel time in excess of their normal commute. The policy advises employees that time spent driving to and from an offsite location for training sessions and meetings is considered time worked. It also includes an example of how an employee should compute compensable travel time.

Defendant makes its travel time policy available to employees by posting it on the company's intranet site. Defendant also sends emails to its stations from time to time reminding employees of the travel time policy.

Station emergency contact list

Defendant requires station managers and assistant managers to provide an offsite phone number where they may be reached in the event of a station emergency. The offsite phone number is included on a contact list posted at the station where the manager and assistant manager work.

PROCEDURAL HISTORY

In their operative first amended complaint, plaintiffs allege that defendant failed to pay current and former nonexempt retail gasoline station employees for time spent traveling to and from work-related meetings and training sessions at offsite locations. Plaintiffs further allege that defendants regularly required station employees to use their

personal cell phones for work-related purposes but failed to reimburse them for cell phone usage costs.

Plaintiffs filed a motion seeking to certify a class of all past and current nonexempt gasoline station employees who worked for defendant in California at any time during the period from September 26, 2007, through the present, and a subclass of all nonexempt gasoline station employees who attended any offsite training sessions or meetings without payment of travel time wages. Plaintiffs subsequently sought class certification of a subclass of all current and former nonexempt gasoline station employees who worked as station managers or assistant managers in California and who used cellular telephones for work-related purposes between September 26, 2007, to the present. Plaintiffs limited their cell phone claim to reimbursement for costs associated with maintaining a cell phone in order to receive work-related calls.

On July 18, 2014, the trial court issued an order denying plaintiffs' motion for certification of a travel-time class. The trial court concluded that given the multiple ways in which employee travel time could be recorded in defendant's timekeeping software, common issues of proof did not predominate. The court continued the matter as to certification of a cellular telephone expense class and requested supplemental briefing on whether defendant's policy that station managers and assistant managers provide a contact number required managers to maintain cell phones and incur their attendant expenses.

On February 3, 2015, the trial court denied certification of a cellular telephone expense class. The court found there was no substantial evidence of any express policy or practice by defendant that required station managers and assistant managers to remain in contact with the station or to own or use a cell phone, and that absent such policy or practice, an individualized inquiry would be necessary to determine whether each station manager's or assistant manager's use of a cell phone was a necessary expenditure.

Plaintiffs appealed separately from the trial court's orders denying in part their motion for class certification and moved to consolidate the two appeals. We granted the motion to consolidate.

DISCUSSION

I. Applicable law and standard of review

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions.' [Citations.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022 (*Brinker*).)

"'"Ordinarily, appellate review is not concerned with the trial court's reasoning but only with whether the result was correct or incorrect. [Citation.] But on appeal from the denial of class certification, we review the reasons given by the trial court for denial of class certification, and ignore any unexpressed grounds that might support denial. [Citation.] We may not reverse, however, simply because *some* of the court's reasoning was faulty, so long as *any* of the stated reasons are sufficient to justify the order. [Citation.]" [Citation.] Any valid, pertinent reason will be sufficient to uphold the trial court's order.' [Citation.]" (*Cruz v. Sun World Internat., LLC* (2015) 243 Cal.App.4th 367, 373, quoting *Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 726.)

"The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."' [Citations.]" (*Brinker, supra*, 53 Cal.4th at p. 1021.)

The only element of class suitability at issue in this appeal is whether common questions of law or fact predominate. Predominance is a factual question, and the trial court's finding that common issues do or do not predominate is reviewed for substantial evidence. (*Brinker*, *supra*, 53 Cal.4th at p. 1022.) The relevant inquiry "is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] . . . 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' [Citations.]" (*Id.* at pp. 1021-1022, fn. omitted.) Class treatment is not appropriate "'if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the "class judgment"' on common issues. [Citation.]" (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28.)

II. Travel time class

Under California law, travel time during work or at the employer's direction in excess of the time spent during the employee's regular work commute is counted as hours worked and must be compensated as such. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 587; Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2015) ¶ 11:854, pp.11-141 to 11-142.)

Plaintiffs do not dispute that defendant's written travel time policy is consistent with California law. They contend defendant violated its own travel time policy and California law by not compensating nonexempt station employees for work-related travel time. Plaintiffs further contend class treatment of their travel time claim is appropriate because defendant's own payroll records enable them to ascertain both liability and damages on a class-wide basis.

Defendant's payroll records consist of Excel spreadsheets containing payroll information for nonexempt employees from 2008 to 2013. Plaintiffs contend these spreadsheets can be used to establish class-wide liability because they show that defendant did not pay a vast majority of its nonexempt employees for their work-related travel time. They point out that the spreadsheets show no travel, or TVL entries for 2008 and 2009, even though there are 896 entries for training in 2008 and 5,673 entries for training in 2009. In 2010, there were 5,046 training entries, but only 498 TVL entries; in 2011, there were 4,979 entries for training but only 1,043 TVL entries; in 2012, there were 6,053 entries for training but only 1,433 TVL entries; and in 2013, there were 5,927 entries for training but only 1,934 TVL entries.

The spreadsheets also show, however, that station managers recorded employee travel time variously as "Training Hours," "Overtime Adj.," "Exception Pay," "Regular Time Adj.," and "Mileage," instead of the "TVL" option available in the Blue Cube adjustment editor function. The spreadsheets include a "comments" column in which station managers sometimes provided further explanation for an employee time entry. The explanation provided in many cases indicates that the time entered was for "driving time" or "travel time," even though the manager had not designated it as such by selecting the TVL code in the Blue Cube adjustment editor function. Explanations provided by managers in the "comments" column in other cases indicate that compensable travel time was not separately entered, but was combined with, and included in the total training hours entered. Other explanatory comments indicate that training sometimes took place at the employee's normal work station and required no job-related travel. These comments include, for example, descriptions such as "New employee training at station," "training at station," and "onsite training." Many "training hours" entries have vague explanations in the "comments" column such as "monthly safety meeting," "o.e. meeting," "paperwork training," and "office training," so that it is unclear where the meeting or training occurred and whether it was onsite or offsite. The majority of "training hours" entries have no explanation whatsoever in the "comments" column. For these entries, there is no way of knowing whether the training occurred

onsite or offsite, and if offsite travel was required, whether compensable travel time was included in the total hours entered.

The evidence as a whole thus shows that liability is not amenable to class-wide proof, but requires individualized inquiries into (1) whether compensable travel time was unreported, or was recorded as something other than TVL; (2) whether travel time was combined with training hours or other work hours and is not separately identifiable in the payroll records; (3) whether recorded training time hours were for onsite or offsite training; (4) whether travel time to an offsite location exceeded the employee's normal commute, and should have been recorded, or was less than the normal commute and therefore unrecorded. Establishing whether a violation occurred would require a case-by-case inquiry for each employee.

Plaintiffs do not address the numerous and variable factual issues their theory of recovery presents. They instead argue that these factual issues should not preclude class certification, and cite *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388 as support for this argument. *Alberts* involved a putative class action against an employer for meal and rest break violations. The court in *Alberts* reversed the order denying class certification in part because the trial court had incorrectly assumed that the facial legality of the employer's written policy was undisputed, when the plaintiffs had in fact disputed its legality. (*Id.* at p. 406.) The *Alberts* court also concluded that the trial court had applied an incorrect standard for certification by improperly focusing on the sufficiency of the evidence to support the plaintiffs' right to recovery rather than on the relevant inquiry of whether the employer's practices allegedly resulting in the denial of lawful breaks and off-the-clock compensation could be determined on a class-wide basis. (*Id.* at p. 407.) Finally, the court in *Alberts* found that the plaintiffs had presented "persuasive common proof" of the employer's illegal practices and policies, including evidence that employees were pressured to continue working through their meals breaks even though they had clocked out and back in to show a meal period; evidence that employee time records were altered to cover-up unlawful practices, and the absence of

any procedure for employees to report missed breaks and to be paid for them. (*Id.* at pp. 415-417.)

Alberts is factually distinguishable from the instant case. Here, the facial legality of defendant's written policy is undisputed, and the record shows that the trial court applied the proper criteria for determining whether class treatment was appropriate. The trial court stated that its focus was not on potentially conflicting issues of fact or law, but whether the theory of recovery advanced by plaintiffs would be amenable to class treatment. The trial court reviewed the evidence, which showed that employees could, and often did, enter their compensable travel times into defendant's electronic timekeeping system in multiple ways other than the TVL code. The trial court then concluded that plaintiffs' theory of recovery would require an individualized inquiry to determine whether employees recorded travel time by a method other than the TVL code; whether employees were or were not paid for such time; and if compensable travel time was unrecorded, why it was not recorded.

Plaintiffs contend the trial court improperly engaged in a merit-based analysis of their claim by ruling that a determination as to "'why' an employee worked off-the-clock precluded class certification." This argument mischaracterizes the trial court's ruling, which was premised, not on the merits of plaintiffs' claim, but on the variable and individualized inquiries their theory of recovery necessitated in light of the evidence. The argument also misstates the applicable law. Our Supreme Court has observed that "'issues affecting the merits of a case may be enmeshed with class action requirements . . . .' [Citation.] . . . When evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them. [Citations.]" (*Brinker, supra*, 53 Cal.4th at p. 1023.)

Plaintiffs also cite *Williams v. Superior Court* (2013) 221 Cal.App.4th 1353 (*Williams*) and *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986 (*Jones*) as support for their certification argument, but those cases, too, are distinguishable. The employers in both *Williams* and *Jones* had an unlawful, company-wide policy of denying their employees compensation for certain off-the-clock work. (*Williams*, at pp. 1357,

1370; *Jones*, at pp. 989-990, 996.) The employers opposed class certification by arguing that individual issues predominated regarding the specific tasks for which employees were purportedly not compensated. (*Williams*, at p. 1370; *Jones*, at p. 996.) The courts in *Williams* and *Jones* both concluded that the employer's unlawful company-wide policy was the common basis for liability, and that the individual issues were relevant only to recovery of damages, not the common question of the employer's liability. (*Williams*, at pp. 1369-1370 ["An unlawful practice may create commonality even if the practice affects class members differently]; *Jones*, at p. 997["theory of recovery based on the existence of a uniform policy denying compensation for preshift work presents predominantly common issues of fact and law"].) Such commonality does not exist here, where it is undisputed that defendant had a lawful policy of compensating employee travel time and that it paid employees for all recorded time. Employees were informed of the policy and were encouraged to report their travel time to station managers to record in the electronic timekeeping system. Individualized issues are present here not because of the variable impact of an unlawful company-wide policy, but because of the myriad ways in which employees reported and recorded their travel time.

Substantial evidence supports the trial court's determination that numerous factually unique questions predominate, making class treatment inappropriate in this case.

The record shows no abuse of discretion by the trial court in denying certification of a travel time class.

III. Cell phone class

Labor Code section 2802, subdivision (a) provides that "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the direction of the employer." Plaintiffs claim that defendant violated that statute by requiring employees to use their own cell phones in connection with their jobs but not reimbursing them for their cell phone expenses. In support of their motion for class certification, plaintiffs submitted declarations stating that they would "routinely" receive phone calls on their cell phones from station employees in connection with issues

that arose when plaintiffs were not physically present at the station and that they were required to use their cell phones to communicate with other employees.

Defendant in turn presented plaintiffs' own deposition testimony, in which they admitted that defendant did not require them to provide the stations with their personal cell phone numbers, but that they elected to do so of their own accord. Defendant also presented declarations by its operations manager and human resources manager stating that nonexempt station employees are not required to have cell phones, or to provide a cell phone number. Defendant's policies in fact prohibit the use of personal cell phones while at work. Defendant's operations manager further stated that station managers and assistant managers are not required to be "on call" while away from the station, nor are they subject to disciplinary action for not answering a call or for not returning a call while they are off duty or offsite. If a station manager or assistant manager is unavailable by telephone in the event of a station emergency, station employees are trained to go down the contact list to reach the next available contact person.

In his declaration, defendant's operations manager contrasted nonexempt station employees with exempt employees in supervisory positions who work in the field rather than at the stations. These exempt employees are issued company cell phones and must provide their cell phone numbers on the station emergency contact list because defendant expects them to be reachable in the event of an emergency.

The record supports the trial court's determination that there was insufficient evidence of a common policy or practice by defendant to require putative class members to remain in contact with the station or to answer phone calls such that work-related cell phone expenses could be determined on a classwide basis.

Plaintiffs nevertheless contend class treatment is appropriate and that our decision in *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137 mandates reversal of the trial court's order denying certification of a cell phone class. That case, however, is inapposite. The issue in *Cochran* was whether an employer must reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or whether the reimbursement obligation is limited to instances in which the employee

incurred an extra expense he or she would not have otherwise incurred absent the job. (*Id*. at p. 1144.) We concluded that reimbursement is required when an employee is required to make work-related calls on a personal cell phone. (*Ibid.*)

Here, there was no evidence that nonexempt station employees are required to own or use a personal cell phone for work-related purposes. The trial court found no substantial evidence of any common policy or practice by defendant that required putative class members to remain in contact with their stations or to answer phone calls while away from the station such that expenses for work-related cell phone use could be determined on a class-wide basis. The trial court considered the evidence, including defendant's policy that managers and assistant managers provide an offsite phone number in the event of a station emergency, and whether that policy gave rise to class-wide issues of proof that use of a cell phone was necessary. The trial court concluded that it did not, and that the evidence showed that defendant did not require its managers and assistant managers to have a cell phone or to provide a cell phone number, and that off-duty managers who did not answer calls to their offsite phone numbers suffered no negative repercussions.

The trial court did not abuse its discretion by denying certification of a cell phone class.

DISPOSITION

The July 18, 2014 and February 3, 2015 orders denying plaintiffs' motion for class certification are affirmed. Defendant is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT